आयकर अपीलीय अधिकरण "H" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.4537/Mum/2016

(**निर्धारण वर्ष /** Assessment Year : 2011-12)

Shri Roopam P. Bhartiya, 146, Krishna Bhavan, 2nd floor, Room No. 15, Dr. Vighas Street, Kalbadevi Road, Mumbai – 400 002.	**बनाम**/ v.	Income Tax Officer – 14(3)(4), Mumbai.
स्थायी लेखा सं./PAN : ADXPB 6346A		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by :	Shri Piyush Chhajed
Revenue by :	Shri M.C.Omi Ningshen,DR

सुनवाई की तारीख **/Date of Hearing : 28-09-2017**
घोषणा की तारीख /**Date of Pronouncement : 29.09.2017**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 4537/Mum/2016, is directed against the appellate order dated 23rd March, 2016 passed by the

learned Commissioner of Income Tax (Appeals)- 29, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2011-12, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 28th February, 2014 passed by the learned Assessing Officer (Hereinafter called " the AO") u/s 143(3) of the Income-tax Act,1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> "1) On the facts and the circumstance of the case the learned Commissioner of Income Tax (Appeals) erred in confirming disallowance of Rs.7,000/- on account of brokerage, Rs.15,000/- on account of Commission and Rs.17,985/- on account of Interest Paid on Loan under Section 40(a)(ia).
>
> 2) On the facts and the circumstance of the case the learned Commissioner of Income Tax (Appeals) erred in confirming addition of Rs.20,00,000/- as Long Term Capital Gains without appreciating that Assessee did not owned any Apartment and the Flat sold during the year was sold by Mr. Prahladrai Bhartia and all the sales proceeds were also received by him.
>
> 3) On the facts and the circumstance of the case the learned Commissioner of Income Tax (Appeals) erred in not allowing the cost of purchase and indexation thereafter even after presuming that the above Flat was owned by the Assessee."

3. At the outset learned counsel for the assessee fairly submitted before the Bench that he donot want to press Ground no. 1 which is related to disallowance u/s 40(a)(ia) as to its applicability on the amount of covered expenditure which are outstanding for payment as at year end or will it apply on all expenditures which are covered by the provisions of Section 40(a)(ia) even if the said expenses are already paid during the year and nothing remains to be payable as at the year end, wherein Hon'ble Supreme Court in

the case of Palam Gas Service v. CIT (2017) 394 ITR 300(SC) has recently decided the issue against assessee by holding that disallowance u/s 40(a)(ia) shall be made even if the entire amount of covered expenditure are paid during the financial year and nothing remains to be paid at the year end, which decision of Hon'ble Supreme Court is binding on the assessee as it is now law of the land. The relevant extract of decision of Hon'ble Supreme Court is as under:

"14. *In the aforesaid backdrop, let us now deal with the issue, namely, the word 'payable' in Section 40(a)(ia) would mean only when the amount is payable and not when it is actually paid. Grammatically, it may be accepted that the two words, i.e. 'payable' and 'paid', denote different meanings. The Punjab & Haryana High Court, in P.M.S. Diesels (supra) referred to above, rightly remarked that the word 'payable' is, in fact, an antonym of the word 'paid'. At the same time, it took the view that it was not significant to the interpretation of Section 40(a)(ia). Discussing this aspect further, the Punjab & Haryana High Court first dealt with the contention of the assessee that Section 40(a)(ia) relates only to those assessees who follow the mercantile system and does not cover the cases where the assessees follow the cash system. Those contention was rejected in the following manner:*

> *'19. There is nothing that persuades us to accept this submission. The purpose of the section is to ensure the recovery of tax. We see no indication in the section that this object was confined to the recovery of tax from a particular type of assessee or assessees following a particular accounting practice. As far as this provision is concerned, it appears to make no difference to the Government as to the accounting system followed by the assessees. The Government is interested in the recovery of taxes. If for some reason, the Government was interested in ensuring the recovery of taxes only from assessees following the mercantile system, we would have expected the provision to so stipulate clearly, if not expressly. It is not suggested that assessees following the cash system are not liable to deduct tax at source. It is not suggested that the provisions of Chapter XVII-B do not apply to assessees following the cash system. There is nothing in Chapter XVII-B either that suggests otherwise.*

20. Our view is fortified by the Explanatory Note to Finance Bill (No. 2) of 2004. Sub-clause (ia) of clause (a) of Section 40 was introduced by the Finance Bill

(No. 2) of 2004 with effect from 01.04.2005. The Explanatory Note to Finance Bill-2004 stated:-

*" ** ** **

With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or fees for technical services to residents, and payments to a resident contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section(1) of section 200 and in accordance with the other provisions of Chapter XVII-B. ……"

21. The adherence to the provisions ensures not merely the collection of tax but also enables the authorities to bring within their fold all such persons who are liable to come within the network of tax payers. The intention was to ensure the collection of tax irrespective of the system of accounting followed by the assessees. We do not see how this dual purpose of augmenting the compliance of Chapter XVII and bringing within the Department's fold tax payers is served by confining the provisions of Section 40(a)(ia) to assessees who follow the mercantile system. Nor do we find anything that indicates that for some reason the legislature intended achieving these objectives only by confining the operation of Section 40(a)(ia) to assessees who follow the mercantile system.

22. The same view was taken by a Division Bench of the Calcutta High Court in Commissioner of Income Tax v. Crescent Export Syndicate, (supra). It was held:-

'12.3. It is noticeable that Section 40(a) is applicable irrespective of the method of accounting followed by an assessee. Therefore, by using the term 'payable' legislature included the entire accrued liability. If assessee was following mercantile system of accounting, then the moment amount was credited to the account of payee on accrual of liability, TDS was required to be made but if assessee was following cash system of accounting, then on making payment TDS was to be made as the liability was discharged by making payment. The TDS provisions are applicable both in the situation of actual payment as well of the credit of the amount. It becomes very clear from the fact that the phrase, 'on which tax is deductible at source under Chapter XVII-B', was not there in the Bill but incorporated in the Act. This was not without any purpose.'

***15.** We approve the aforesaid view as well. As a fortiorari, it follows that Section 40(a)(ia) covers not only those cases where the amount is payable but also when it is paid. In this behalf, one has to keep in mind the purpose with which Section 40 was enacted and that has already been noted above. We*

have also to keep in mind the provisions of Sections 194C and 200. Once it is found that the aforesaid Sections mandate a person to deduct tax at source not only on the amounts payable but also when the sums are actually paid to the contractor, any person who does not adhere to this statutory obligation has to suffer the consequences which are stipulated in the Act itself. Certain consequences of failure to deduct tax at source from the payments made, where tax was to be deducted at source or failure to pay the same to the credit of the Central Government, are stipulated in Section 201 of the Act. This Section provides that in that contingency, such a person would be deemed to be an assessee in default in respect of such tax. While stipulating this consequence, Section 201 categorically states that the aforesaid Sections would be without prejudice to any other consequences which that defaulter may incur. Other consequences are provided under Section 40(a)(ia) of the Act, namely, payments made by such a person to a contractor shall not be treated as deductible expenditure. When read in this context, it is clear that Section 40(a)(ia) deals with the nature of default and the consequences thereof. Default is relatable to Chapter XVIIB (in the instant case Sections 194C and 200, which provisions are in the aforesaid Chapter). When the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word 'payable' occurring in Section 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid. If the provision is interpreted in the manner suggested by the appellant herein, then even when it is found that a person, like the appellant, has violated the provisions of Chapter XVIIB (or specifically Sections 194C and 200 in the instant case), he would still go scot free, without suffering the consequences of such monetary default in spite of specific provisions laying down these consequences. The Punjab & Haryana High Court has exhaustively interpreted Section 40(a(ia) keeping in mind different aspects. We would again quote the following paragraphs from the said judgment, with our complete approval thereto:

> *"26. Further, the mere incurring of a liability does not require an assessee to deduct the tax at source even if such payments, if made, would require an assessee to deduct the tax at source. The liability to deduct tax at source under Chapter XVII-B arises only upon payments being made or where so specified under the sections in Chapter XVII, the amount is credited to the account of the payee. In other words, the liability to deduct tax at source arises not on account of the assessee being liable to the payee but only upon the liability being discharged in the case of an assessee following the cash system and upon credit being given by an assessee following the mercantile system. This is clear from every section in Chapter XVII.*
>
> *27. Take for instance, the case of an assessee, who follows the cash system of accounting and where the assessee who though liable to pay the*

contractor, fails to do so for any reason. The assessee is not then liable to deduct tax at source. Take also the case of an assessee, who follows the mercantile system. Such an assessee may have incurred the liability to pay amounts to a party. Such an assessee is also not bound to deduct tax at source unless he credits such sums to the account of the party/payee, such as, a contractor. This is clear from Section 194C set out earlier. The liability to deduct tax at source, in the case of an assessee following the cash system, arises only when the payment is made and in the case of an assessee following the mercantile system, when he credits such sum to the account of the party entitled to receive the payment.

28. The government has nothing to do with the dispute between the assessee and the payee such as a contractor. The provisions of the Act including Section 40 and the provisions of Chapter XVII do not entitle the tax authorities to adjudicate the liability of an assessee to make payment to the payee/other contracting party. The appellant's submission, if accepted, would require an adjudication by the tax authorities as to the liability of the assessee to make payment. They would then be required to investigate all the records of an assessee to ascertain its liability to third parties. This could in many cases be an extremely complicated task especially in the absence of the third party. The third party may not press the claim. The parties may settle the dispute, if any. This is an exercise not even remotely required or even contemplated by the section."

16. *As mentioned above, the Punjab & Haryana High Court found support from the judgments of the Madras and Calcutta High Courts taking identical view and by extensively quoting from the said judgments.*

17. *Insofar as judgment of the Allahabad High Court is concerned, reading thereof would reflect that the High Court, after noticing the fact that since the amounts had already been paid, it straightaway concluded, without any discussion, that Section 40(a)(ia) would apply only when the amount is 'payable' and dismissed the appeal of the Department stating that the question of law framed did not arise for consideration. No doubt, the Special Leave Petition thereagainst was dismissed by this Court in limine. However, that would not amount to confirming the view of the Allahabad High Court (See V.M. Salgaocar & Bros. (P.) Ltd. v. CIT [2000] 243 ITR 383/110 Taxman 67 (SC) and Supreme Court Employees Welfare Association v. Union of India [1989] 4 SCC 187 .*

18. *In view of the aforesaid discussion, we hold that the view taken by the High Courts of Punjab & Haryana, Madras and Calcutta is the correct view and the judgment of the Allahabad High Court in Vector Shipping Services (P) Ltd. (supra) did not decide the question of law correctly. Thus, insofar as the*

judgment of the Allahabad High Court is concerned, we overrule the same. Consequences of the aforesaid discussion will be to answer the question against the appellant/assessee thereby approving the view taken by the High Court."

The Learned DR did not raise any objection to the dismissal of ground no. 1 on account of Hon'ble Supreme Court decision in the case of Palam Gas Service (supra) . After hearing both the parties, we order dismissal of Ground No. 1 on merits in view of binding decision of Hon'ble Supreme Court in the case of Palam Gas Service (supra) wherein issue is decided against the assessee as detailed above. We , therefore, dismiss ground No. 1 on merits by deciding the same against assessee. This issue is decided against the assessee. We order accordingly.

4. The brief facts of the case are that the assessee carried on the business of retail trading in fabrics in the proprietary concern M/s R.S. Syntex. During the course of assessment proceedings u/s 143(3) of 1961 Act, the A.O. observed that during the previous year under consideration, the residential flat situated at B-201, 2nd floor Runwal Towers CHS Ltd., LBS Marg, Mulund (W), Mumbai was sold for a consideration of Rs. 60 lacs. The agreement for sale dated 23.07.2010 was filed before the A.O. which revealed that there were names of three persons namely Mr. Prahladrai Bharthiya, Roopam Prahladrai Bharthiya and Mrs. Usha P. Bharthiya as transferors of the said flat. The assessee contended that the entire payment towards the purchase of flat was made by Mr. Prahladrai Bharthiya only and hence the entire sale consideration of Rs. 60 lacs was credited to the bank O/D account of Mr. Prahladrai Bharthiya. The A.O. considered the submission of the assessee and observed as under:-

i) Though the assessee claims that the entire purchase cost of the flat was met by Mr.Pralhadrai Bhartiya only, nothing

has been kept in support thereof on record, such as, the photo copy of the relevant page of the bank statement, evidencing the outflow of funds towards agreement dated 29.11.1999 made and entered into with M/s. Runwal Chembers, Chembur, Mumbai-400072, copy of the annual accounts in general and the balance sheet in particular of Mr.Pralhadrai Bhartiya etc.

ii. The assessee failed to file the photo copy of the agreement dated 29.11.1999.

iii. The assessee failed to quote the purchase cost of the flat.

iv) The quantum of the amount towards sale consideration received by each of the Transferor no way lead to an answer to million dollar question as to "In whose hands, the capital gains tax will be charged".

The A.O. observed that the assessee has not brought on record such as photocopy of the purchase agreement dated 29th November, 1999 entered into with M/s Runwal Chambers for purchase of said flat B-201, 2nd floor Runwal Towers CHS Ltd., LBS Marg, Mulund (W), Mumbai . Thus, the A.O. adopted a sum of Rs. 20 lacs as assessee's share in sales consideration for arriving at the working of the amount of long term capital gain on sale of said flat and no credit was given towards indexed cost of acquisition and hence the long term capital gain of Rs 20 lacs (being 1/3) was brought to tax by the AO vide assessment order dated 28-02-2014 passed u/s 143(3) of 1961 Act.

5. Aggrieved by the assessment order dated 28-02-2014 passed by the A.O. u/s 143(3) of 1961 Act, the assessee filed first appeal before the ld. CIT(A).

6.The assessee reiterated the submission made before the A.O. and submitted that the said flat B-201, 2nd floor Runwal Towers CHS Ltd., LBS Marg, Mulund (W), Mumbai was owned by Mr. Prahladrai Bharthlya and the entire purchase price for the flat i.e. Rs.14,12,951/- was paid by Mr. Prahladral

Bharthlya alone. It was submitted that the assessee and Mrs. Usha P. Bhartiya did not contribute anything and therefore they did not have any right in the said flat. Mr. Prahladrai Bharthia had mortgaged the flat and obtained the loan from Karur Vysya Bank and out of the sale proceeds of Rs.60 lacs received from sale of the said flat, Rs.55 lacs were directly deposited in the bank towards discharge of loans taken by Shri. Pahladrai Bharthiya. It was further submitted that the said flat was never shown in the balance sheet of the assessee but was reflected as an asset in the balance sheet of Mr. Prahladrai Bhartlva. The assessee submitted that the copies of the balance sheet for the assessment year 2003-04 of Mr. Prahladrai Bhartiya had been filed which showed the flat as office premises valued at 14,12,951/- in the balance sheet. The ld. CIT(A) observed that the purchase deed for purchase of this flat was not produced either before the A.O. or before the ld. CIT(A). The learned CIT(A) observed that even if purchase deed is not produced but since the assessee has sold the property, clearly indicate that the assessee had a right in the property and in the absence of the determination of shares, it was presumed that his share would be equal to 1/3rd as there were three co-owners. The ld.CIT(A) observed that the contention of the assessee that the assessee did not made any payment towards the purchase of flat was not supported by any evidence. It was also observed that the flat had been sold for a consideration of Rs. 60 lacs but no capital gain had been paid by any of the parties. Mr. Prahladrai Bhartiya had not filed the return of income with the Revenue for the impugned assessment year and no taxes have been paid, hence, the ld. CIT(A) upheld the addition made by the A.O. , vide appellate order dated 23-03-2016 passed by the learned CIT(A).

7. Aggrieved by the appellate order dated 23-03-2016 passed by the ld. CIT(A), the assessee filed an appeal before the Tribunal.

8. The ld. Counsel for the assessee submitted that the flat was purchased in the year 1999 and the agreement for purchase of the flat was entered into by three persons namely Mr. Prahladrai Bhartiya, Mr. Roopam Prahladrai Bhartiya and Mrs. Usha P. Bhartiya. The ld counsel for the assessee submitted that the assessee did not contributed any amount nor his mother Mrs. Usha P. Bhartiya contributed any amount towards purchase of the said flat . It is submitted that the entire sale consideration was credited to the bank account of Mr. Prahladrai Bhartiya. The assessee brought on record agreement dated 29-11-1999 for purchase of flat. The copy of agreement for sale with Runwal Estates P. Ltd. is placed on record vide paper book page 48-92. It was submitted that the said agreement dated 29-11-1999 for purchase of the said flat was not produced before the A.O. . Copy of Agreement dated 23-07-2010 for sale of the said flat is placed on record at paper book page 97 to 123. It is submitted that loan was obtained from Karur Vyasa bank against mortgage of the said flat. It was submitted that father of the assessee purchased the said flat in the year 1999 which was sold in the year 2010. Our attention was invited to paper book page 106 whereby Shri Prahladrai Bharthia has been shown as owner as registered holder of the shares in society. Our attention was also drawn to paper book page 36 whereby statement of schedule of fixed assets and depreciation for financial year 2002-03 is placed of Shree Keshav Textile , wherein 'office premises' of Rs. 14,21,951/- is shown. It is submitted that Sh. Prahaladrai Bharthiya is proprietor of Shree Keshav Textiles., for which our attention to that effect is drawn to tax-audit report dated 06-10-2003 which is placed in paper book /page 25. It is submitted that old records have been seized in a criminal case as there was some property dispute and the same is now not available. Our attention was drawn to paper book page 56 of the agreement for sale clause 5.2 wherein purchase consideration for purchase of the flat is mentioned. it is submitted that Mr. Prahladrai Bharthiya has also not filed return of income and no taxes had been paid by any of the three persons namely Mr.

Prahladrai Bharthiya, Mr. Roopam Prahladrai Bharthiya and Mrs. Usha P. Bharthiya whose name appear in purchase and sale deed of the said property. The ld. Counsel also drew our attention to letter dated 23rd December, 2013, 17th January 2014 and 29th January 2014 which were submitted before the A.O. wherein all the said facts were narrated. The said replies filed before the AO are placed in paper book/page 9-15.It is submitted that in alternative without prejudice , if the issue is decided against the assessee , then in that case , the assessee shall be allowed benefit of deduction of cost of the flat(assessee's share of 1/3) and indexation benefit should be granted to the assessee. It is submitted that no sanction letter of the bank is available nor any bank statements of Prahaladrai Bharthiya are available. The ld. Counsel for the assessee, in the rejoinder, submitted that audited balance sheet of father of the assessee namely Mr. Prahladrai Bhartiya was filed for financial year 2002-03 .

9. The ld. D.R. submitted that the purchased deed was not submitted before the A.O. and also was not submitted before the ld. CIT(A). It was submitted that the assessee has not filed any evidence that the entire payment for purchase of the flat was made by the father of the assessee. The learned DR supported the orders of authorities below. He fairly agreed that if the share of sale of the said flat is to be brought to tax in the hands of the assessee, then the assessee will be entitled for share in purchase price of the said flat. It is submitted that it is an admitted position that none of the three co-owners of the flat paid capital gain tax on sale of the flat.It was submitted that name of the assessee is coming in sale and purchase agreement. It is submitted that it is a joint family who is living together and each owner has 1/3 share.

10. We have considered rival contention and also perused the material available on record. We have observed that the assessee has in its name

jointly with his father and mother, a flat situated at 201, B-201, Runwal Towers CHS Ltd., LBS Marg, Mulund (W), Mumbai which was sold for a consideration of Rs. 60 lacs during the previous year relevant to the impugned assessment year on 23-07-2010. The said flat was purchased in the name of these three owners in the year 1999 on 29-11-1999. The name of the assessee is appearing in purchase deed for purchase of flat as well sale deed for sale of flat along with name of Mr. Prahladrai Bhartiya, and Mrs. Usha P. Bhartiya who are father and mother of the assessee. The said deeds for purchase and sale of the flat under consideration are placed in paper book filed with the tribunal. It is the contention of the assessee that the assessee has not made any payment for purchase of the said flat while his name is only added for the sake of convenience being the flat owned by the family. The two other persons who are jointly holding the flat are Mr. Prahladrai Bhartiya and Mrs. Usha P. Bhartiya who are father and mother of the assessee. Thus, the flat was jointly owned by close family members of the assessee and the assessee himself, which is not unusual in Indian context. It is the say of the assessee that father of the assessee paid entire consideration for purchase of this flat in the year 1999. The assessee could not produce bank statement or any other cogent evidences to substantiate that the entire payment of this flat was made by Mr Prahaladrai Bharthiya in the year 1999. The assessee has produced income tax return for assessment year 2003-04 of his father , wherein only 'office premises' Rs. 14,12,925/- is mentioned(paper book/page 36), wherein no other details whatsoever are mentioned. This piece of evidence claimed by the assessee is an unsubstantiated/unverifiable documents and cannot be relied upon to give relief to the assessee , unless it is corroborated independently. The assessee has produced purchase agreement dated 29-11-1999 for the first time before tribunal which needs verification by authorities below and is a valuable documents for adjudicating this issue before us. We find that the assessee has produced the sale deed dated 23rd July, 2010 which clearly shows vide clause (c), (d) & (e) that the

assessee is the co-owner among the three parties i.e. assessee's father and mother. Loan was taken from the bank by all the three parties which fact albeit disputed by the assessee is , however, emanating from the records. The said clauses of the sale agreement dated 23-07-2010 are reproduced hereunder (page 98/pb) :

> *"(c) Initially Transferor no. 1, 2 & 3 have jointly purchased and acquired the said flat from the Promoter M/s Runwal Estate Private Limited, a company incorporated and registered in India and having its registered office situate at RUNWAL CHAMBERS, First Road, Chembur, Mumbai-400072 by virtue of an Agreement dated 29th day of November , 1999. The said agreement is duly registered with the Jurisdictional sub registrar.*
> *(d) The Transferor 1, 2 & 3 have availed financial assistance from KARUR VYSYA BANK LTD against mortgage/charge on the said flat and said shares.*
>
> *(e) The Transferor have agreed to clear all loan liability of KARUR VYSYA BANK LTD on the said flat , and will give clear , marketable title free from encumbrances and vacant possession of the said flat"*

Perusal of the sale agreement dated 23-07-2010 leaves no doubt that all the three persons namely Mr. Prahladrai Bhartiya, Mr. Roopam Prahladrai Bhartiya and Mrs. Usha P. Bhartiya have ownership right , title and interest in the said flat along with they jointly availed loan from Karur Vysya Bank unless said presumption is rebutted by the assessee with cogent evidences. The assessee's father has not filed income tax return for the year under consideration and capital gain earned on this flat was not declared to the

Revenue , and only one year records i.e. for assessment year 2003-04 of father are produced and that also did not establishes that the father of the assessee has declared this flat in the said return of income as general description ' office premises' is mentioned . No evidence is brought on record which could show that the payment were made by the assessee's father as no bank statement of father is produced by the assessee. Nor bank statement wherein proceeds of the sale of office are credited are brought on record. Any assumption of the facts in the absence of evidence will be contrary to material on records and shall be in the realm of conjectures and surmises. It is incumbent on the assessee to have brought on record all the evidences whereas the assessee did not brought on record any evidence to rebut the presumption which is against the assessee that the assessee is one of the co-owner of the said flat as is emanating from purchase and sale deed as well loan obtained by the assessee against the mortgage of said flat from Karur Vysya Bank Limited. The entire sale consideration of Rs. 60 lacs was claimed to be credited to the bank O/D account of Mr. Pralharai Bhartiya , while the sale agreement clearly stipulates that all the three transferor have availed financial assistance from Karur Vysya Bank and all of three have decided to clear the loan. The documents of bank loan are not brought on record on the pretext that there was some dispute with the bank and hence the bank is not providing bank statements / loan details. The purchase and sale documents leave no room of doubt that the flat is jointly owned by all the three family members namely Mr. Prahladrai Bhartiya, Mr. Roopam Prahladrai Bhartiya and Mrs. Usha P. Bhartiya . The burden of proof and onus of proof is on the assessee to prove the facts as these facts are especially within knowledge of the assessee. The presumption u/s 106 of Indian Evidence Act, 1872 shall apply. Section 106 of Indian Evidence Act ,1872 clearly stipulates as under:

"106. Burden of proving fact especially within knowledge

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> Illustrations
>
> (a)****
>
> (b) A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him."

The assessee was not able to discharge burden of proof/onus of proof cast u/s 106 of 1872 Act as the assessee did not file documents for showing that the flat was exclusively owned by father of the assessee and payments for acquisition of the flat was exclusively paid by father of the assessee. The assessee could not rebut the presumption of ownership of the flat jointly with the mother and father of the assessee , with cogent evidences that the assessee name is merely included in the said flat for name sake . The assessee only filed one unsubstantiated accounts for assessment year 2003-04 of father of the assessee which only showed general description 'Office Premises' without having any details of the said flat and verification from the Revenue that the total consideration was paid by the assessee's father which was reflected in his statement of affairs/balance sheet filed with revenue. The father of the assessee had also not paid taxes on capital gain earned from the sale of the said flat and hence no taxes on this sale of flat is paid to Revenue. In view of peculiar facts and circumstances of the case, the contentions of the assessee cannot be accepted. The assessee has however filed purchase agreement for the purchase of this flat for the first time before the tribunal. We have perused both the sale agreement and purchase agreement which are placed on record in paper book filed with the tribunal. Thus, we are of the considered view that the capital gain on sale of assessee's share in the said flat (being 1/3)is to be brought to tax in the hand of the assessee. However, the A.O. is directed to give relief for the cost of acquisition

of the flat and cost inflation index , as per provisions of section 48 & 49 of the Act in accordance with law after verification of the purchase deed dated 29-11-1999 and other cogent and credible material brought on record by the assessee. We order accordingly.

11. In the result, appeal filed by the assessee in ITA No. 4537/Mum/2016 for assessment year 2011-12 is partly allowed for statistical purposes as indicated above.

Order pronounced in the open court on 29th September, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांकः 29.09.2017 को की गई ।

Sd/-	sd/-
(JOGINDER SINGH)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 29.09.2017

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai H" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
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